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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

) Case No. 10-03870-SC
JOHN SHIRLEY, individually and as)
trustee of the JOHN F. SHIRLEY) ORDER GRANTING DEFENDANT'S
and JULIE E. SHIRLEY 2003 TRUST,) AND THIRD-PARTY
and JULIE SHIRLEY,) DEFENDANT'S MOTIONS FOR
) <u>SUMMARY JUDGMENT</u>
Plaintiffs,)
)
v.)
)
WACHOVIA MORTGAGE FSB, WELLS)
FARGO BANK N.A., and DOES 1-10,)
)
Defendants.)
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WACHOVIA MORTGAGE, a division of)
WELLS FARGO BANK, N.A., formerly)
known as WACHOVIA MORTGAGE, FSB,)
)
Third-Party Complainant,)
)
v.)
)
LSI TITLE COMPANY; LENDER)
PROCESSING SERVICES, INC.;)
FIDELITY NATIONAL INFORMATION)
SERVICES, INC.; and ROES 1)
through 10, inclusive,)
)
Third-Party Defendants.)
)
)
)
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1 **I. INTRODUCTION**

2 Plaintiffs John Shirley ("Shirley") and Julie Shirley
3 (collectively, "Plaintiffs") bring this action against Defendants
4 Wachovia Mortgage FSB ("Wachovia") and its successor in interest,
5 Wells Fargo Bank, N.A. ("Wells Fargo").¹ The case arises out of
6 alleged irregularities in closing documents executed in connection
7 with the refinancing of Plaintiffs' home in 2008. Plaintiffs
8 allege that someone forged certain dates and initials on these
9 closing documents, a Truth-in-Lending Disclosure Statement
10 ("TILDS") and Notice of Right to Cancel ("NRC"), and that,
11 consequently, he is entitled to rescission of his loan under the
12 Truth-in-Lending Act ("TILA"). Wachovia brings a third-party
13 complaint against LSI Title Company ("LSI"), the escrow holder on
14 Plaintiffs' loan. Wachovia alleges that LSI is responsible for any
15 irregularities in Plaintiffs' TILDS and NRC documents and seeks
16 indemnity for any fees incurred to defend against Plaintiffs' suit,
17 as well as any damages incurred as a result of a settlement or
18 adverse judgment.

19 Wachovia now moves for summary judgment against Plaintiffs,
20 and LSI moves for summary judgment against Wachovia. ECF Nos. 48
21 ("LSI MSJ"), 51 ("Wachovia MSJ"). These motions are fully briefed.
22 ECF Nos. 54 ("Pls.' Opp'n"), 55 ("Wachovia Opp'n"), 56 ("LSI
23 Reply"), 57 ("Wachovia Reply").² Having reviewed all of the
24 parties' briefs and arguments, the Court finds these matters
25 suitable for adjudication without oral argument. As detailed

26 ¹ Hereinafter, the Court refers to Wells Fargo as Wachovia, its
27 predecessor in interest.

28 ² LSI has also filed a Statement of Non-Opposition to Wachovia's
motion for summary judgment against Shirley. ECF No. 53.

below, the Court GRANTS Wachovia's motion for summary judgment against Plaintiffs and LSI's motion for summary judgment against Wachovia.

II. BACKGROUND

A. Plaintiffs v. Wachovia

Plaintiffs purchased their home in Sonoma, California in June 2004 for \$1.96 million. Dolan Decl. Ex. A.³ On February 29, 2008, Plaintiffs acquired a \$1.76 million loan from Wachovia to refinance their home.⁴ Dolan Decl. Exs. B, C. In April 2010, Plaintiffs defaulted on the loan and, shortly thereafter, demanded rescission, based on two purported TILA violations. Id. Ex. L. On June 7, 2010, Wachovia mailed Plaintiffs a "Pre-Foreclosure Reinstatement Quote," informing them that the loan was \$30,101.44 in arrears. Id. Ex. M. Plaintiffs subsequently furnished Wachovia with the delinquent funds, preventing foreclosure. Id. ¶ 14.

On July 26, 2010, Plaintiffs filed the instant action in state court. ECF No. 1 ("Not. of Removal"). Wachovia removed the action to federal court and Plaintiffs subsequently filed a First Amended Complaint ("FAC"). Id.; ECF No. 12 ("FAC"). In the FAC, Plaintiffs allege that two TILA violations extended the rescission

³ Michael Dolan ("Dolan"), an Operations Analyst in Wachovia's Mortgage Lending Operations Department, and Michael Rapkine ("Rapkine"), Wachovia's attorney, filed declarations in support of Wachovia's motion for summary judgment, attaching exhibits. ECF Nos. 51-1 ("Rapkine Decl."), 51-7 ("Dolan Decl."). Rapkine also submitted a declaration in opposition to LSI's motion for summary judgment. ECF No. 55-1 ("Rapkine Opp'n Decl.").

⁴ Apparently, Shirley is better informed than the average borrower in the real estate market. He formerly practiced law, held a real estate broker's license in the "late '70s, early '80s," and has obtained a number of adjustable rate mortgages since 1981. Rapkine Decl. Ex. C ("Shirley Dep.") at 10-11, Ex. B ("Interrog. Resp.") at 5.

1 period on his refinanced loan to three years from the loan closing
2 date. FAC ¶¶ 14-15. Accordingly, Plaintiffs seek rescission of
3 the loan and damages based on finance charges paid by Plaintiffs on
4 the loan, which are estimated to be at least \$334,647. FAC at 4.

5 Under TILA and one of its implementing regulations, Regulation
6 Z,, a borrower has the right to rescind a refinancing or equity
7 mortgage transaction within three business days of the date the
8 borrower receives the TILDS or the NRC, whichever is later -- and
9 within three years if the lender fails to provide such a notice.
10 12 C.F.R. § 226.15; 15 U.S.C. § 1635. Plaintiffs allege that the
11 NRC incorrectly stated that they had the right to rescind the
12 transaction before midnight of February 26, 2008 -- the same day
13 that Shirley allegedly received and signed the NRC. FAC ¶ 14.
14 Plaintiffs allege that the signature date on the NRC was altered to
15 February 23, 2008 by someone other than Shirley and that the NRC
16 contains Shirley's forged initials. Id. Likewise, Plaintiffs
17 allege that the TILDS was: "received, signed, and dated by
18 [Shirley] on February 26, 2008. Thereafter, someone other than
19 [Shirley] altered the date to February 23, 2008 and forged the
20 initial[s] 'JS'." Id. ¶ 15.

21 In his deposition, Shirley stated that he met with the notary,
22 Michelle Barry, in connection with his refinancing transaction on
23 both February 23 and February 26, 2008.⁵ Shirley Dep. at 20.
24 Shirley explained that he met with Barry twice because she did not
25 bring all of the loan documents with her the first time. Rapkine
26 Opp'n Decl. Ex. A at 55. Specifically, Shirley testified: "[Barry]

27
28 ⁵ Shirley also conceded that he first became aware of the alleged
TILA violations sometime in 2008. Shirley Dep. at 27-28.

1 said she had received the loan documents via e-mail and that some
 2 were missing and some were not legible." Id. Shirley also
 3 testified that he signed the TILA disclosures on February 26, 2008
 4 and contends that someone later backdated his signature to February
 5 23, 2008, and then forged his initials approving the change. See
 6 id. at 33. On the other hand, Barry has testified that Shirley
 7 signed the disclosures on February 23, 2008. Rapkine Decl. Ex. D
 8 ("Barry Dep.") at 24-25. Barry claims that she mistakenly dated
 9 the disclosures "February 26, 2008" and then corrected the date to
 10 February 23, 2008 in front of Shirley, with Shirley's consent. Id.
 11 Barry also testified that she has no records or recollection of
 12 meeting with Shirley for a second time on February 26, 2008. Id.
 13 at 15-16. The Court does not reach the issue of whether Shirley or
 14 Barry's story is more credible since it may not make such
 15 determinations on a motion for summary judgment.

16 On September 14, 2010, after the suit was filed, Plaintiffs
 17 sold their Sonoma home. Various documents indicate that the sale
 18 price was \$2.2 million, \$240,000 more than the purchase price.
 19 Dolan Decl. Ex. N; Rapkine Decl. Ex. E.

20 **B. Wachovia v. LSI**

21 On September 8, 2011, Wachovia filed a third-party complaint
 22 against LSI, who acted as Wachovia's escrow closing agent in
 23 connection with Plaintiffs' loan. ECF No. 33 ("Wachovia Compl.") ¶
 24 3.⁶ Wachovia alleges that LSI had a contractual duty to Wachovia
 25 to provide Shirley with the NRC and TILDS and to obtain Shirley's
 26

27 ⁶ Wachovia's Complaint also names as defendants Lender Processing
 28 Services, Inc. ("LPS"), LSI's parent company, and Fidelity National
 Information Services ("FIS"), LPS's parent company. Wachovia
 Compl. ¶¶ 4-5. The Court refers to LSI, LPS, and FIS as LSI.

1 dated signature on the closing materials, pursuant to written
2 instructions from Wachovia. Id. ¶ 12. The crux of the complaint
3 is that, if Plaintiffs' allegations are true, Plaintiffs' action is
4 the proximate result of LSI's violation of the Closing Instructions
5 set forth in the agreement between LSI and Wachovia. See id. ¶ 16.
6 The Closing Instructions include the requirements that:

- 7 • LSI warrant "the authenticity of the signatures of each party
8 executing each document" and that "all original documents must
9 be signed and dated where appropriate." Wachovia Compl. Ex. A
10 ("Closing Instructions") § 1 ¶ 4.
- 11 • "Alterations or Erasures are not permitted on any document
12 without prior written approval from [Wachovia's] Final
13 Documentation department. Any approved alterations or
14 attachments must be initialed by the parties concerned." Id.
15 § 1 ¶ 6.

16 Wachovia asserts claims for (1) equitable indemnity, (2)
17 breach of contract, (3) contractual indemnity, (4) declaratory
18 relief, (5) negligence, and (6) breach of fiduciary duty. Wachovia
19 Compl. ¶¶ 17-47. Among other things, Wachovia seeks equitable
20 indemnity together with attorney's fees in an amount not less than
21 fees "incurred by Wachovia to defend this action and to prosecute
22 the third-party complaint, as well as any damages incurred by
23 Wachovia as a result of a settlement or judgment." Id. at 11.

24 25 **III. LEGAL STANDARD**

26 Entry of summary judgment is proper "if the movant shows that
27 there is no genuine dispute as to any material fact and the movant
28 is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). Summary judgment should be granted if the evidence would require a directed verdict for the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

IV. DISCUSSION

A. Shirley v. Wachovia

Wachovia makes four principle arguments in favor of summary judgment against Plaintiffs: (1) Plaintiffs' rescission request was not supported by a valid tender; (2) Plaintiffs' right of rescission terminated when they sold the underlying property; (3) Plaintiffs' claim is barred by laches; and (4) the purported defects in the NRC and TILDS did not extend the rescission period to three years. Wachovia MSJ at 4-14. The Court finds that

1 Wachovia's second argument has merit and, therefore, need not and
2 does not address the other three.

3 TILA expressly provides that a borrower's right to rescission
4 expires upon the sale of the property:

5
6 Time limit for exercise of right. An obligor's right of
7 rescission shall expire three years after the date of
8 consummation of the transaction or upon the sale of the
9 property, whichever occurs first, notwithstanding the
10 fact that the information and forms required under this
section or any other disclosures required under this
chapter [15 USCS §§ 1631 et seq.] have not been delivered
to the obligor

11 15 U.S.C. § 1635(f).

12 The case law in this circuit concerning Section 1635(f) is
13 well-settled: a sale of the underlying property terminates a
14 borrower's TILA rescission rights. See Meyer v. Ameriquest Mortg.
15 Co., 342 F.3d 899, 900 (9th Cir. 2003). In Meyer, the borrowers
16 alleged that their NRC had been incorrectly dated, allowing them a
17 three-year period to rescind the loan. 342 F.3d at 902. The Ninth
18 Circuit held that once the borrowers sold their home, the TILA
19 rescission provision no longer applied. Id. The court reasoned:
20 "The regulation is clear: the right to rescind ends with the sale."
21 Id. at 903. A number of courts, including this one, have followed
22 Meyer and held that both voluntary and involuntary sales extinguish
23 a borrower's right to rescission. See, e.g., Ford v. Wells Fargo
24 Home Mortg., No. 08-4276 SC, 2008 U.S. Dist. LEXIS 98963, at *7-9
25 (N.D. Cal. Dec. 1, 2008).

26 Plaintiffs argue that Meyer is inapposite. Pls.' Opp'n at 6-
27 7. The Court disagrees. In any event, even if Meyer were
28 distinguishable (though it is not), the Court cannot ignore the

1 express language of Section 1635(f). Nor can the Court ignore the
2 weight of authority that has applied Meyer or the principles of
3 Meyer in cases presenting factual situations similar to the instant
4 action. See, e.g., Macilvaine v. Wachovia Fin. Servs., NO.
5 08cv2384 BTM (AJB), 2009 U.S. Dist. LEXIS 78888, at *5-8 (S.D. Cal.
6 Aug. 24, 2009); Ford, 2008 U.S. Dist. Lexis 98963, at *7-9; Davis
7 v. Wells Fargo Bank, N.A., No. S-09-3028 FCD/GGH, 2010 U.S. Dist.
8 LEXIS 41911, at *14-15 (E.D. Cal. Apr. 29, 2010).

9 Plaintiffs also contend that the Court should follow a
10 decision by the U.S. Bankruptcy Court for the District of Columbia
11 in In re Dawson, 437 B.R. 15 (Bankr. D.D.C. 2010). In Dawson, the
12 bankruptcy court expressly broke with the precedent set forth in
13 Meyer and held: "If a borrower has given timely notice of
14 rescission and sued to enforce that right prior to the expiration
15 of three years without having sold the property, the right of
16 rescission has been exercised, and does not later expire after
17 three years have passed or the property is sold." 437 B.R. at 19.
18 The court's decision is based on Section 1635's use of the term
19 "exercise." Id. The court reasoned that borrowers exercise their
20 right to rescission when they notify their creditor of their intent
21 to rescind and/or bring a suit for rescission, not when the
22 transaction is actually rescinded. See id.

23 The Court declines to follow Dawson. As an initial matter,
24 the case is inconsistent with the weight of authority in this
25 circuit and with Meyer, which constitutes binding Ninth Circuit
26 precedent.⁷ Additionally, the Court does not find the reasoning of

27
28 ⁷ Indeed, Meyer rejected an interpretation of Section 1635 similar
to the one set forth by the bankruptcy court in Dawson. Addressing

1 Dawson compelling. To the extent that the language of Section 1635
2 is ambiguous concerning the time frame for rescission, that
3 ambiguity has been clarified by its implementing regulations.
4 Specifically, 12 C.F.R. 226.23(a)(3) states that "the right to
5 rescind shall expire 3 years after consummation, upon transfer of
6 all of the consumer's interest in the property, or upon sale of the
7 property, whichever occurs first." The Court also notes that
8 Dawson's reading of Section 1635 would lead to an anomalous result
9 -- the rescission of an agreement that has already been
10 superseded.⁸

11 For these reasons, the Court GRANTS Wachovia's motion for
12 summary judgment against Plaintiffs.

13 ///

14 the plaintiffs' reliance on dicta from Hefferman v. Bitton, 882
15 F.2d 379 (9th Cir. 1989), the Ninth Circuit stated:

16 In a dictum the court observed, "Even if § 1635(f) were
17 interpreted to refer only to the time at which a consumer
18 must notify a lender of his intention to rescind, a
19 proposition that we do not decide, we hold that Hefferman
20 should have sent the notice before contracting to sell
21 her property." [Citation.] This unnecessary statement by
22 the court is not a holding that, if an actual sale
23 occurs, notice of rescission before the completion of the
24 sale will be valid. The regulation is clear: the right to
25 rescind ends with the sale.

26 Meyer, 342 F.3d at 903.

27 ⁸ The Court also notes that, under the circumstances, ordering
28 rescission would be far from equitable. Rescission would allow
Plaintiffs to recoup the more than \$300,000 in finance charges they
paid on their loan over nearly three years, effectively giving them
a \$1.76 million interest-free loan. Shirley has conceded that he
was aware of the alleged TILA violations "[s]ometime in 2008,"
Shirley Dep. at 27-28, but he did not bring suit for rescission
until sometime in 2010. Further, Plaintiffs do not dispute that
they received all of the disclosures to which they were entitled to
under the law. Nor do Plaintiffs dispute that, with the exception
of the three-day rescission period, the substance of these
disclosures was accurate.

1 **B. Wachovia v. LSI**

2 Wachovia seeks indemnity from LSI for damages and attorney's
3 fees incurred as a result of Plaintiffs' lawsuit. As the Court has
4 granted Wachovia's motion for summary judgment against Plaintiffs,
5 the issue of indemnity for damages is moot. Unhelpfully, neither
6 Wachovia nor LSI has briefed the issue of whether Wachovia could
7 still recover attorney's fees for defending against Plaintiffs'
8 suit if that suit was found to be without merit.⁹ As the parties
9 have not addressed the issue, neither will the Court. In any
10 event, the Court finds that Wachovia has failed to raise a triable
11 issue of fact as to whether LSI engaged in any type of wrongdoing.

12 LSI argues that it is entitled to summary judgment because its
13 duties are limited to those set forth in the Closing Instructions
14 and the Closing Instructions did not direct LSI to independently
15 verify Shirley's signature on the loan documents. LSI MSJ at 7-8.
16 LSI also argues that if Shirley's initials were in fact forged on
17 the closing documents, they were forged by Barry, the notary, who
18 is not an employee or agent of LSI. Id. at 11.

19 Wachovia does not dispute that LSI did not have a duty to
20 verify Shirley's signature. Wachovia Opp'n at 5. However,
21 Wachovia argues that if neither Shirley nor Barry changed the date
22 on the closing documents and added the initials "JS," then the
23 changes must have been made by someone at LSI, without Wachovia or
24 Shirley's consent. Id. This argument is unavailing as it is

25 _____
26 ⁹ Wachovia clearly would not be entitled to attorney's fees if the
27 Court had rejected the allegations that someone other than Shirley
28 had altered the date on Shirley's NRC and TILDS without his
consent. But the Court has not reached that issue. The Court
finds that Plaintiffs' claims against Wachovia lack merit because
their right to rescission terminated with the sale of his property.

1 predicated on pure speculation. Wachovia has offered no evidence
2 that anyone at LSI altered Plaintiffs' loan documents. The only
3 pertinent evidence before the Court on this issue is (1) Barry's
4 testimony that she altered the documents with Shirley's consent and
5 (2) Shirley's testimony that he did not alter the documents and he
6 did not give Barry permission to do so. Thus, the material
7 question is whether Barry had permission to alter the documents,
8 not, as Wachovia contends, who altered the documents.

9 Wachovia also argues that LSI should be held liable for
10 "failing to provide [Barry] with the complete package of closing
11 documents, thereby necessitating a second visit to the Shirley
12 residence on February 26." Id. at 6. Wachovia relies on Shirley's
13 testimony that, on February 23, "[Barry] said she had received the
14 loan documents via e-mail and that some were missing and some were
15 not legible." Id. This argument also lacks merit. Whether or not
16 Plaintiffs received an incomplete set of loan documents on February
17 23 is irrelevant to Wachovia's liability in the instant action.
18 Plaintiffs' claim for rescission is predicated on the allegation
19 that someone altered his loan documents without his consent, not
20 that he received incomplete loan documentation. Further, even if
21 Barry did provide Shirley with incomplete loan documentation on
22 February 23, Shirley's testimony indicates that Barry supplemented
23 that documentation on February 26. Rapkine Opp'n Decl. at 55.

24 Wachovia has failed to raise a genuine issue of material fact
25 as to whether LSI was in some way responsible for the alleged
26 forgery. Accordingly, the Court GRANTS LSI's motion for summary
27 judgment against Wachovia.

28

1 **V. CONCLUSION**

2 For the reasons set forth above, the Court GRANTS Wachovia's
3 motion for summary judgment against Plaintiffs John and Julie
4 Shirley. The Court also GRANTS LSI's motion for summary judgment
5 against Wachovia. Both Plaintiffs' action and Wachovia's third-
6 party action are dismissed in their entirety.

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8
9 IT IS SO ORDERED.

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11 Dated: March 29, 2012


12 UNITED STATES DISTRICT JUDGE